88-1581

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY OF LOS ANGELES
AND RONALD BLACK,
Petitioners,
vs.
JOSEFINA CABRALES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a policy or custom of deliberate indifference to the serious medical needs or safety of jail inmates can be established where an inmate is examined, diagnosed and prescribed treatment by a competent jail psychiatrist and the prescribed treatment is implemented; and

(2) Whether a policy or custom of deliberate indifference to the serious medical needs or safety of jail inmates can be the proximate cause of a constitutional deprivation where no individual commits a constitutional violation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

THE COURT OF APPEALS' OPINION IS CONSISTENT WITH THE DECISIONS OF THIS COURT. 2

CONCLUSION. 8

TABLE OF AUTHORITIES

Page

Cases

Cabrales v. County of Los Angeles
864 F.2d 1454 (9th Cir. 1988) 3

City of Los Angeles v. Heller
475 U.S. 796 (1986) 6-8

City of St. Louis v. Praprotnik
108 S.Ct. 915 (1988) 6-8

Duchesne v. Sugarman
566 F.2d 817 (2d Cir. 1977) 7

Estelle v. Gamble
429 U.S. 97 (1976) 5

Hoptowit v. Ray
682 F.2d 1237 (9th Cir. 1982) 3

McCann v. Coughlin
698 F.2d 112 (2d Cir. 1983) 7

Melear v. Spears
862 F.2d 1177 (5th Cir. 1989) 7

Monell v. Dept. of Social Services of New York
436 U.S. 658 (1978) 6, 7

Williams v. Smith
781 F.2d 319 (2d Cir. 1986) 7

Wright v. McMann
460 F.2d 126 (2d Cir. 1972) 7

Page

Statutes

42 U.S.C. Section 1983 (1982) 2

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STATEMENT OF THE CASE

Respondent Josefina Cabrales believes that Petitioners' Statement of the Case is incomplete, and therefore incorporates by this reference the Court of Appeals' FACTS section of its Opinion set forth at pages A-4 to A-7 of the Petition as her Statement of Facts.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS' OPINION IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

As on appeal, Petitioners' arguments miss the points.

Petitioners again argue that they were held liable for "deliberate[ ] indifferen[ce] to decedent's serious medical needs *even though decedent was diagnosed and prescribed treatment that was implemented.*" Pet. at 5 (emphasis added). Also, Petitioners argue again that they were held liable "even though no County employee, or official, committed a constitutional violation." *Id.* at 5-6. What Petitioners continue to gloss are the facts that a policy or custom of *inadequate diagnosis and treatment* that is caused by deliberate indifference to the serious medical needs of inmates is actionable under 42 U.S.C. Section 1983 (1982), and, when such deliberate indifference to serious medical needs is by way of *omission*, rather than by affirmative acts, it balks common sense and law to contend that a governmental employee must be held liable for a constitutional violation in order for liability to attach to the governmental entity.

Petitioners' arguments reduce to these two propositions: (1) standing a jail inmate up in front of a physician always discharges the duty to provide adequate medical care for serious medical needs; and, (2) insufficient medical staffing of a jail, which results in inadequate medical care being rendered, never can give rise to a constitutional violation, because once inadequate care is rendered, such inadequate care can be characterized only as negligence, and negligence is not actionable as a constitutional deprivation. The first proposition simply is false. The second proposition is false because the first

proposition is false, and is false because it is the deliberate indifference to providing sufficient staffing that is the cause of the violation, and not negligence. The second argument is akin to contending that when a jailer beats an inmate to death, and the inmate's heart stops beating, the cessation of heart function, and not the beating is the cause of death. That just is not so.

The Court of Appeals readily recognized the fallacious and unsound nature of Petitioners' contentions, and disposed of them as follows:

> The plaintiff alleged that the understaffing deprived the decedent of adequate psychiatric care because psychiatrists had too little time to analyze and treat inmates' psychological problems.

Cabrales v. County of Los Angeles, 864 F.2d 1454 (9th Cir. 1988), Pet. at A-1 to A-25. (References in this Response will be to the pages in the Petition Appendix.) A-5. The Court of Appeals then sets forth the applicable legal standard — which is consonant with the rulings of this Court.

> Prison or jail officials "show deliberate indifference to serious medical needs if prisoners are unable to make their medical needs known to the medical staff. Access to the medical staff has no meaning if the medical staff is not competent to deal with the prisoners' problems." *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) (citation omitted).

Id. at A-12. The Court of Appeals then applied the correct standard to Petitioners' contentions.

> [A]ppellants seem to argue that only *affirmative* acts constitute a policy or custom for section 1983 purposes. . . . The very notion of deliberate "indifference" connotes a regime

> where neglect of detainees' medical and psychological needs proves a constitutional violation. Also acts of omission, as well as commission, may constitute the predicate for a finding of liability under section 1983.
> [B]ecause [decedent] was not denied *access* to medical and psychiatric help [appellants argue that no violation can have occurred]. . . . [But] access to medical staff is meaningless unless that staff is competent and can render competent care. *Hoptowit*, 682 F.2d at 1253. . . . [M]edical understaffing at the jail directly contributed to the decedent's suicide. . . . The omission by the County and its policymakers in providing adequate medical care at the Men's Central Jail was the policy or custom that was the "moving force" behind the deprivation of the decedent's constitutional rights without due process.

Id. at A-13. Petitioners simply gloss the fact that the evidence adduced at trial from "a California medical doctor, board-certified in psychiatry, and a Ph.D. in criminal justice who taught that subject at American University in Washington, D.C.[,]" *id.* at A-10, which is the very same evidence noted by the Court of Appeals as having been presented in opposition to Petitioners' motion for summary judgment showed the following:

> They analyzed the psychological and medical staffing at the jail and concluded that the facility was seriously understaffed. They found the understaffing to constitute a deliberate decision or policy on the part of the appellants that constituted deliberate indifference to the decedent. They noted that some 1500-1600 detainees a month showed some need for psychiatric attention and the understaffing

> would allow a psychiatrist to spend approximately 12 minutes a month with a person in need of psychiatric attention.

Id. at A-11. Also, Petitioners gloss the fact that their own jail psychiatrist, Dr. Manual Vargas, who was the actual psychiatrist who remembered speaking to the decedent, testified at trial that his ability to render adequate psychiatric care had been "compromised" by the jail understaffing. RT-3:309. In the face of this evidence, and the law as applied to this evidence, Petitioners' arguments in this Court are both without merit and frivolous.

Respondent did prove deliberate indifference to decedent's serious medical needs. "[E]xamination by a competent psychiatrist who diagnosed [decedent's] condition and prescribed treatment which was given[,]" Pet. at 6, does not satisfy Petitioners' legal obligation under the Constitution of the United States to provide adequate care for serious medical needs, *Estelle v. Gamble*, 429 U.S. 97 (1976), when the "competent" psychiatrist himself testifies that his ability to render adequate medical care has been "compromised" by the Petitioners' deliberate indifference to proper staffing requirements. A psychiatrist standing before a conveyor belt filled with inmates who pass by the psychiatrist's station hardly satisfies the requirement that American jails render adequate medical attention to inmates' serious medical needs.

Contrary to Petitioners' argument to consequences that the "decision below will allow and encourage actionable constitutional claims based on negligent medical treatment[,]" A-6, the fact is that the decision of the Court of Appeals, along with a denial of certiorari by this Court, will have the potential salutary effect of encouraging Petitioners not to be deliberately indifferent to the serious medical needs of inmates and to provide

constitutionally-adequate medical staffing at their jails so that jail physicians will not be in a position in which they simply attempt to do the best they can, albeit negligently, given the deliberately inadequate resources with which they are forced to work.

Petitioners' argument that *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (a case in which Respondent's legal counsel in this case represented Heller), and *City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988), warrant a result different than the result reached by the Court of Appeals is specious. In *Heller*, since all possible defendants were before the court, and since *affirmative* acts as oppossed to acts of omission as here, were in issue, it was within the range of logic for this Court to find, as it did, that since Heller had not proved a constitutional violation against *any* government employee, he therefore had not set forth a predicate for the *Monell* liability of the government. Here, because not all potential constitutional tortfeasors were before the trial court, and because *acts of omission* are involved, *Heller*, is inapposite. In any event, Petitioner Black was sued both in his *personal* and official capacities. He claimed and was afforded a jury instruction on the affirmative defense of qualified immunity. Since "law enforcement officers are entitled to a qualified immunity defense in their *personal* capacities [only and not in their *official* capacities,]" *Melear v. Spears*, 862 F.2d 1177, 1182 (5th Cir. 1989), if *Heller* were applicable to the facts of this case, the jury's finding against Black would be a proper predicate for its imposition of *Monell* liability against the County of Los Angeles. And, since Black's successor as the commander of the jail testified at trial that at the time of decedent's suicide *Black* was the County official responsible for setting the jail staffing policies, *Praprotik* is satisfied. The jury found that Black committed the constitutional violation by setting the policy under

whose provisions the *omissions* which proximately caused decedent's suicide occurred.

When a policy provides for *inaction*, it is fallacious to contend that there must be an *actor* who *commits* an act in order for there to be a constitutional violation. Presumably, Petitioners also would argue that if the County and/or Black had decided that there would be no psychiatrists at the jail, and therefore no one would have engaged in any *affirmative* conduct to cause a constitutional violation, then there could be no constitutional liabililty. Because it is the law that "[a] supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue[,]" *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986), that "[i]t is not necessary for §1983 liability that the appellees directed any particular action with respect to these specific individuals, only that they *affirmatively* promoted a policy which sanctioned the type of action which caused the violations[,]" *Duchesne v. Sugarman*, 566 F.2d 817, 830-31 (2d Cir. 1977); *see also, McCann v. Coughlin*, 698 F.2d 112, 125 (2d Cir. 1983), and that "one is liable for the natural consequences of his [or her] actions[,]" *Wright v. McMann*, 460 F.2d 126, 135 (2d Cir. 1972), Black, the supervisor of the jail who was delegated the authority under state law to make jail policy, who *affirmatively* made such policy that sanctioned deliberately indifferent medical care and negligent medical care, and who is liable for the "natural consequences" of his policies, is properly liable under both *Heller* and *Praprotnik*, notwithstanding that neither of those cases is controlling on the facts of this case. Without Black's constitutionally-deficient policy of understaffing, no actionable constitutional tort could have occurred; but his policy is the legal predicate for the deliberate indifference, indeed it is the deliberate indifference, that makes decedent's suicide actionable.

CONCLUSION

For the reasons set forth, the Court either should deny certiorari or summarily affirm the opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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